FILED
JAN 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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No. 07-793

In the
Supreme Court of the United States

UNITED AMERICAN INSURANCE COMPANY,
Petitioner,

v.

Natalie MERRILL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY BRIEF FOR THE PETITIONER

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January 22, 2008

QUESTION PRESENTED

This case presents the same issue that this Court addressed in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007): "[W]hether the Constitution's Due Process Clause permits a jury to base [a punitive-damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)." *Id.* at 1060 (emphasis in original).

The specific question presented here is whether this Court should GVR for further consideration in light of *Williams*.

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ARGUMENT

Merrill's brief in opposition disputes very little of what is said in United's petition for certiorari. It makes no meaningful effort to deny that, on the facts, the punitive-damages award here was tainted by impermissible appeals to nonparty injuries. Nor does it offer any sustained argument why, under this Court's precedents, a GVR would be inappropriate here. Instead, it stakes its case for denial on a single procedural objection—that United waived in state court any argument that the punitive award here violates the principles this Court enunciated in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). That objection is unavailing.

The brief in opposition asks this Court to venture a guess about how the Mississippi courts—which, to be clear, have never decided the waiver issue—would apply state law in the unique circumstances presented here. But the brief's waiver argument is *not* an objection to a GVR; it is an objection to the Mississippi courts ultimately giving United relief from the judgment. That is another conversation for another day in another court. There is no use in this Court conducting an in-depth analysis of what, given the particulars here, could be a tricky question of Mississippi law. This Court should instead do what it has done before in materially identical circumstances: GVR in light of *Williams* and allow the Mississippi courts to decide for themselves whether, under Mississippi law, United abandoned the *Williams* issue in state court.

I. The Brief in Opposition Makes No Meaningful Effort To Defend the Constitutionality of the State-Court Proceedings That Produced the Punitive Award Here.

In the petition, United demonstrated, at length and in detail, that the state-court proceedings here were infected with *Williams* error from the very outset and, indeed, that the infection permeated every phase of the case. Pet. 12–17. There is no point in going over the same ground here, because the brief in opposition makes almost no effort to rebut United's factual demonstration. Two examples should suffice to underscore the seriousness of the problem.

First, at trial, Merrill's lawyers explicitly premised their request for punitive damages on an appeal to nonparty injuries. In closing argument, one of them expressly situated his appeal to nonparty injuries within a reference to Jesus' teaching about the last judgment:

> [W]e told you this was an important case, a big important case, *because this case is not only about Ms. Merrill. It's about insurance consumers throughout this country* and how insurance companies are to treat and live up to the contracts they make with their people. Because, you know, as Jesus said, as you do to me, you do to the least of me. And *as this company has done to Ms. Merrill, you know, there's other insured—other insurance consumers out here who would make claims.*

RR 932 (emphasis added). *Compare* Matthew 25:40.

Second—not quite so sensational but equally problematic given what this Court said in *Williams* about the use of nonparty-injury evidence specifically to "*punish*," *e.g.*, 127 S. Ct. at 1060, 1065—Merrill's lawyers explicitly asked the Mississippi Supreme Court to affirm the punitive award based on allegations of nonparty injury. In their brief to that court, Merrill's lawyers reiterated that "[t]he evidence demonstrated the impact a punitive damage verdict would have on *punishing United for business in Mississippi*, by showing that Ken Parker, United's General Agent for the State of Mississippi, was number one in the sale of life insurance policies in the nation." Br. of Appellee at 30, *United Am. Ins. Co. v. Merrill*, __ So. 2d __, 2007 WL 2493905 (Miss. Sept. 6, 2007) (emphasis added). Continuing the punishment theme, they argued later in the same document that the punitive award was "appropriate to *punish United*, which denies up to 95% of similar claims, *for the impact of its gross misconduct in Mississippi*—where it sells more life insurance policies than any other State in the Nation." *Id.* at 74 (emphasis added).[1]

As best we can tell, save for a single, studiously ambiguous reference (BIO 25) to "counsel's closing statement"—*i.e.*, the Biblical injunction—the brief in opposition makes no effort to deny that, as a factual matter, Merrill's state-court lawyers repeatedly appealed to nonparty-injury evidence. Instead, the brief in opposition makes a strained legal argument, describing the *Williams* rule as one aimed solely at preventing juries from "multiply[ing] the compensatory damage award of a single plaintiff by the number of presumed in-state vic-

[1] Although we demonstrated the inaccuracy of the 95% figure in the petition (Pet. 14 n.6), the brief in opposition continues to invoke it as if the record unambiguously "establishes" its truth. BIO 2.

tims." BIO 24. Because, the brief argues, "[n]o evidence was adduced to show how many claims United denied," there is "no danger that the compensatory damages found appropriate here directly punished for harm to others." *Id.* at 25. With respect, that is not even remotely what *Williams* says. Instead, in *Williams*, this Court held that (1) while evidence of harm to nonparties may be relevant to the "reprehensibility" guidepost, (2) "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties," and, therefore, (3) that it is "constitutionally important" for a court to provide some "assurance" that a jury does not drift into forbidden "punish[ment]" territory. 127 S. Ct. at 1064.

For reasons we have explained at length, and that the brief in opposition does nothing to refute, the risk that United was in fact "punish[ed]" here for "harms it is alleged to have visited on nonparties," *id.*, is manifest.

II. The Brief in Opposition Makes No Meaningful Effort To Deny That the *Lawrence v. Chater* GVR Factors Apply Here.

The petition demonstrated in detail how each of the criteria articulated in *Lawrence v. Chater*, 516 U.S. 163 (1996), supports a GVR here. Pet. 17–29. The brief in opposition has essentially nothing to say in response.

First, it does not deny that there is "reason to believe the court below did not fully consider" this Court's recent *Williams* decision. *Lawrence*, 516 U.S. at 167. *See* Pet. 18–23. Indeed, the brief in opposition freely admits that the Mississippi Supreme Court never addressed the *Williams* issue. BIO 5, 14. *Second*, save for

an extended foray into Mississippi state waiver law (which we address in detail below, *see infra* Part III), the brief in opposition offers no meaningful response to United's demonstration (Pet. 12–17, 24) that there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167. And with good reason. Given a record so saturated with appeals to nonparty injuries, there is, at the very least, "'reason to question the correctness of the [Mississippi Supreme Court's] decision.'" Pet. 24 (quoting *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997)).

Third, the brief in opposition offers no rejoinder at all to United's demonstration (Pet. 25) that consideration of the *Williams* issue "may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. *Finally*, there is no dispute that the policies underlying this Court's GVR practice favor that disposition here. The brief in opposition makes no effort to deny that a GVR here would (1) assist the Mississippi Supreme Court by "flagging" the *Williams* issue, which it clearly did not consider; (2) conserve this Court's "scarce resources"; (3) aid this Court by "procuring the benefit of the [Mississippi Supreme Court's] insight" on the *Williams* question; and, most importantly, (4) avoid the "'[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant plenary review of all pending cases raising similar issues." Pet. 27–28 (quoting *Lawrence*, 516 U.S. at 167).

The only "merits" argument, so to speak, that the brief in opposition offers against a GVR pertains to the "equities." The brief grudgingly concedes that there is

"no reason to doubt" (BIO 23) the truth or accuracy of the "simple (and honest)" explanation that United's state-court lawyers "were simply unaware of the recent *Williams* decision until after [the Mississippi Supreme Court] rendered judgment"—and, therefore, that "[t]here could be no suggestion that [they] were attempting to 'manipulat[e]' the system by raising *Williams* when they did," namely, on rehearing in that court. Pet. 26 (quoting *Lawrence*, 516 U.S. at 168). The brief in opposition nonetheless attempts to derail United's GVR request with allegations of "gross discovery misconduct" and "dilatory tactics" in the conduct of the trial. BIO 23. There is no point in a detailed response to those allegations because, however dramatic they may seem, they are legally irrelevant. The question in determining the propriety of a GVR is whether the circumstances surrounding the intervening or recent development *itself* are "part of an unfair or manipulative litigation strategy." *Lawrence*, 516 U.S. at 168. For reasons we have explained at length—and that the brief in opposition makes no effort to deny—the answer here is an emphatic no. Pet. 25-26.[2]

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[2] The brief in opposition's other shots likewise miss the mark. Footnote one, for instance, accuses United of having "misrepresent[ed]" the substance of a question on the insurance form (concerning treatment for congestive heart failure) that underlies this case – specifically, by "leaving out the question's time restriction, which limits the inquiry on treatments to those within the prior three years." BIO 2 n.1. There was no misrepresentation. Not only does the petition *expressly* refer to the three-year limitation (Pet. 5), but also, and more fundamentally, the three-year time limit (like almost all of the underlying facts here) is irrelevant. All that could possibly matter is that United denied the claim on the basis of its determination that Robert Merrill had indeed undergone treatment for congestive heart failure during the pertinent period. Pet. 6. And Merrill's brief in opposition expressly admits that much. BIO 3.

III. The Brief in Opposition's Invocation of Mississippi State Waiver Law Is No Basis for Refusing To GVR.

Rather than *either* defending the constitutionality of the punitive-damages award that resulted from the state-court proceedings *or* tackling the GVR question head on, the bulk of the brief in opposition is devoted to various assertions that United waived its *Williams* argument—under Mississippi law—by failing to raise it earlier than it did in state court. BIO i, 1–2, 6–8, 10–12, 15–17, 19–22, 24, 27. The reason the brief in opposition swings so hard is that it fundamentally misunderstands the nature of the relief that United seeks from this Court. Merrill's brief objects to what it perceives as United's request for a GVR in light of *Williams* "in order to *force the court below to reconsider its result* even though" (Merrill claims) "the issue now raised by [United] was procedurally waived under longstanding Mississippi law." BIO i (emphasis added). Merrill's brief makes the same claim repeatedly. *See id.* at 1 ("[United] asks this Court to issue a GVR to force reconsideration in light of *Williams* by the Mississippi Supreme Court even though United never properly raised the issue before that court.").

The brief in opposition tilts at windmills of its own making. United does not ask this Court to "force" the Mississippi courts to reconsider the award here in light of *Williams* without regard to any waiver that might actually have occurred under state law (or, in the brief in opposition's words, to "erase" any supposed waiver, BIO 2). All United asks is that this Court GVR in light of *Williams* and send the case back to the Mississippi Supreme Court. At that point, the Mississippi Supreme

Court—which, again, has never addressed the waiver argument that Merrill makes here—can authoritatively determine for itself whether, in the unique procedural circumstances presented, United waived its *Williams* argument as a matter of state law.

That is precisely the tack this Court has taken when faced with similar circumstances in the past. Consider *Time Warner Entertainment Co. v. Six Flags Over Georgia LLC*, 534 U.S. 801 (2001), in which this Court GVR'd a state-court decision in light of another watershed punitive-damages decision, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In that case, the Georgia Court of Appeals had sustained a punitive award against Time Warner's challenge that it violated "Georgia law." *Time Warner Entm't Co. v. Six Flags Over Georgia LLC*, 537 S.E.2d 397, 416 (Ga. Ct. App. 2000). The state court did not consider or adjudicate any federal-law challenge to the award. After the Georgia Supreme Court denied discretionary review, Time Warner filed a petition for certiorari in this Court seeking, in relevant part, a GVR in light of *Cooper Industries*. Pet. for Cert. at 22–24, *Time Warner* (No. 00-1875). As has Merrill here, the respondent there devoted the great majority of its brief in opposition to various contentions that Time Warner had waived any federal-law challenge to the punitive award by failing to raise it properly in the state courts. BIO 1–2, 7–8, 9–24, *Time Warner* (No. 00-1875). Despite the fact that the alleged state-court waiver there was significantly clearer than any that might arguably have occurred here—Time Warner had *expressly requested* the very "abuse of discretion" standard of review that it then sought to challenge as unconstitutional in this Court, *see id.* at i, 8, 11, 16–17, 22–23—this Court GVR'd to the Georgia Court of

Appeals for "further consideration" in light of *Cooper Industries*. *Time Warner*, 534 U.S. at 801. (On remand, the Georgia Court of Appeals determined that any federal due-process objection to the punitive award had indeed been waived as a matter of state law. *Time Warner Entm't Co. v. Six Flags Over Georgia LLC*, 563 S.E.2d 178, 184–85 (Ga. Ct. App. 2002), *cert. denied*, 538 U.S. 977 (2003).)

Rather than follow the sensible course charted in *Time Warner* (and accord United the same treatment the petitioner there received), the brief in opposition asks this Court to deny certiorari based on its own independent resolution of a pure state-law question (*i.e.*, waiver) that the Mississippi state courts themselves have not yet even addressed.[3] The brief in opposition is chock full of citations to Mississippi court decisions and rules and discussions of Mississippi law. *See, e.g.*, BIO 11, 12, 14, 15, 16, 17, 21, 22, 26. The brief's arguments turn principally on what it says "Mississippi's courts require," *id.* at 10, what "the Mississippi Supreme Court has declared," *id.* at 15, what sorts of limitations "Mississippi's appellate rules reinforce," *id.* at 16, and what kinds of standards "Mississippi has adopted," *id.* at 21. With respect, the brief in opposition has addressed those arguments to the wrong tribunal. They are not objections to this Court's exercise of its traditional GVR practice; rather, they are objections to United ultimately obtaining relief *on remand* in the Mississippi courts.

As in *Time Warner*, GVR here makes good practical sense. This Court has long expressed its reluctance to

[3] Given the absence of any state-court determination of waiver, the brief in opposition is wrong to suggest that there exists here any "independent and adequate state ground" bar. BIO 11 n.6.

decide cases based on interpretations of state law. *See, e.g.*, *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990). There is no point in departing from that practice here and denying certiorari simply because one party contends that an important constitutional issue *may* not have been properly preserved in state court. The simple and prudent solution, given the likelihood that *Williams* error infected the state-court proceedings, is to GVR to the Mississippi Supreme Court. If that court finds a waiver—because United was either (1) insufficiently clairvoyant in failing to request a specific "*Williams* instruction" at trial or (2) insufficiently diligent in presenting the *Williams* issue on appeal—so be it. *See Time Warner*, 563 S.E.2d at 184–85. If, however, the Mississippi Supreme Court determines that, in the unique circumstances presented here, United did not waive its *Williams* argument, that court may then determine whether *Williams* error exists and, if so, what the appropriate remedy ought to be.

United, of course, believes that there is good reason to think that the issue should *not* be deemed waived as a matter of Mississippi law. In particular, it is not at all clear that United should have been required to anticipate this Court's decision in *Williams* either at trial or when it assigned errors in the Mississippi Supreme Court. At both junctures—and, indeed, even at the time United filed its principal brief in the Mississippi Supreme Court—this Court had not yet "h[e]ld explicitly that a jury may not punish for the harm caused others." *Williams*, 127 S. Ct. at 1065. This Court "so h[e]ld" only thereafter, in *Williams*. *Id.* And whether United should be deemed to have waived the *Williams* issue by not bringing it to the Mississippi Supreme Court's attention in its reply brief or in a supplemental filing is, at the very

least, debatable. The point, in any event, is that the debate is one that must initially be had on state-law terms in a court competent to judge it. This is not the forum for *predetermining* the state-law waiver issue.

CONCLUSION

United's proposal here, which is consistent with standard GVR practice and precedent, seeks to elevate substance over form. The brief in opposition's, by contrast, trades on form and form alone – and worse, on a matter of form that is properly decided by the Mississippi courts.

This Court should grant the writ, vacate the Mississippi Supreme Court's judgment, and remand the case to that court for "further consideration" in light of *Williams*. What result that "further consideration" produces will be, at least in the first instance, up to the Mississippi courts.

Respectfully submitted,

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